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No. _____

Supreme Court, U.S.
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# In The Supreme Court of the United States

**JOSEPH LAROSA;**
**LAROSA'S INTERNATIONAL FUEL CO., INC.,**

***Petitioners,***

**v.**

**UNITED STATES,**

***Respondent.***

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT**

## PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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## QUESTIONS PRESENTED

1. Whether the holding by the Court of Appeals for the Federal Circuit in the instant case is correct, that the service of levies by the Internal Revenue Service on "liquid" assets (such as cash in banks and marketable securities) does not reduce those liquid assets to the actual or constructive possession of the Internal Revenue Service, contrary to this Court's holding in *U.S. v. National Bank of Commerce*, 472 U.S. 713 (1985), which holds that service of a notice of levy by the Internal Revenue Service reduces the levied assets to the actual or constructive possession of the Internal Revenue Service when the levy is served.

2. Whether the holding by the Court of Appeals in the Federal Circuit in the instant case is correct in construing *U.S. v. Whiting Pools, Inc.*, 462 U.S. 198 (1983) as holding that levies by the Internal Revenue Service on "liquid" assets as opposed to nonliquid assets (such as furniture and equipment), results in a delay in crediting the proceeds of the levied liquid assets to the taxpayer's account, where the holding in *Whiting Pools*, by the express language of the opinion, and in all subsequent cases involving Internal Revenue Service levies, has been strictly limited to holding that a levy on nonliquid assets only results in a delay in crediting the levied nonliquid proceeds to the tax accounts.

3. Whether the holding by the Court of Appeals for the Federal Circuit in the instant case, that the Internal Revenue Service did not have actual or constructive possession of the liquid assets of the

Taxpayer/Appellant/Petitioner by virtue of having levied on these liquid assets, is in conflict with holdings in other Federal Circuits, notably, *In re Barlows, Inc.*, 36 B.R. 826, 53 A.F.T.R.2d 84-767, 84-1 USTC P 9233 (Bankr. D. Va. 1984), *aff d*, 767 F.2d 1098 (4th Cir. 1985) (holding that the levy on accounts receivable reduced accounts receivable to the dominion and control of the Internal Revenue Service).

4. Whether, in light of 26 U.S.C. § 6601, which provides for payment of interest on overpayments of federal income tax, Petitioners are entitled to interest on funds levied by the Internal Revenue Service, transferred to an escrow account, and held for a period in excess of five years, where the assessment, as finally determined after more than 5 years of litigation, involved was just over 14% of the original amount of levy, and the remaining 86% constituted overpayment.

## RULE 14.1(b) STATEMENT

Pursuant to Supreme Court Rule 14.1(b), Petitioners LaRosa's International Fuel Co. and Joseph LaRosa state that the parties to the proceedings below appear in the caption of the case on the cover page, and that these parties are the United States Department of the Treasury, Internal Revenue Service, and LaRosa's International Fuel Co., and Joseph LaRosa.

## RULE 29.6 STATEMENT

LaRosa's International Fuel Co. is a Maryland corporation and no publicly traded corporation owns or has ever owned any of its stock.

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## PETITION FOR A WRIT OF CERTIORARI

## CITATIONS OF OPINIONS AND ORDERS

The initial opinion of the Court of Appeals for the Federal Circuit is reported at 499 F.3d 1324 (2007). App at 2. The Court of Appeals for the Federal Circuit denied a Petition for Rehearing of the initial opinion, in an unpublished Order. App. at 1. The opinion of the United States Court of Federal Claims related to this appeal, which is not the only opinion issued by that Court in this case, but which is the only opinion involved in this Petition for Writ of Certiorari, is reported at 56 Fed. Cl. 102 (2003). App at 23.

## JURISDICTION

Jurisdiction of the United States Court of Federal Claims was founded on 28 U.S.C. § 1491. Jurisdiction of the United States Court of Appeals for the Federal Circuit was founded on Section 1491, Title 28, United States Code and 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. § 1254(1). The Court of Appeals for the Federal Circuit denied the Petition for Rehearing on November 15, 2007.

## RULES AND STATUTES INVOLVED

The texts of the statutes involved in this case are set forth in the Appendix.

26 U.S.C. § 6601 provides for payment of interest on overpayments of federal income tax. At

issue in this case is whether Petitioners are entitled to a refund of interest on liquid assets levied by the Internal Revenue Service in excess of the balance of tax due.

All of the Questions Presented involve 26 U.S.C. §§ 6331, 6332, 6335, and 6337 which pertain to levies by the Internal Revenue Service on cash, and on property other than cash and cash equivalents. These statutes provide for procedural rights and requirements of notice, sale, redemption, and disposition of the surplus related to funds and property levied by the Internal Revenue Service. Also relevant is 26 U.S.C. § 6342, which provides that levies of cash or cash equivalents by the Internal Revenue Service are to be immediately applied to the tax liabilities at issue.

These statutes are relevant to the extent that they distinguish between levies on liquid assets and levies on nonliquid assets. It is Petitioner's contention that levies on liquid assets reduced these assets to the immediate actual or constructive possession of the Internal Revenue Service, unlike levies on nonliquid assets, which require that the assets be liquidated according to a set of procedures before the Internal Revenue Service obtains funds to be applied to the tax account of the former owner.

Once the levy is served, that is, by the very act of serving the levy, according to statute and case law, the levied liquid assets come into the possession of the Internal Revenue Service. Petitioners therefore contend that they are entitled to have interest credited to their tax accounts at that time,

not at some later time determined arbitrarily when the Internal Revenue Service posts the levied amounts administratively to the taxpayer's account.

Subsequent to the periods involved in this case, the so-called "Taxpayer Bill of Rights" was enacted by the United States Congress. That bill contains procedural safeguards which delay the possessory interests of the Internal Revenue Service for a 21 day period after service of a notice of levy. This statute, contained in 26 U.S.C. § 6332, is not relevant to the instant case because it took effect after the years at issue here. However, the precedential value of this case applies to levies served after the effective date of this statute as well, because taxpayers should be entitled to credit for levied funds after the expiration of the statutory 21 day period, even if these funds are not immediately turned over to the Internal Revenue Service.

## STATEMENT OF THE CASE

### A. The Relevant Facts

This is a tax refund case commenced by the Plaintiffs LaRosa's International Fuel Co., Inc. and one of its shareholders, Joseph LaRosa, to recover interest on funds levied by the Internal Revenue Service pursuant to a jeopardy assessment. These Plaintiffs are the Certiorari Petitioners in this case. Liquid assets of both of the Petitioners were levied, and interest on the levied funds was not ever credited to the tax accounts of either Petitioner. It is the effect of these levy notices on the liquid assets, only, of the Petitioners which is at issue in this case.

In response to the jeopardy assessment, the Plaintiffs filed a timely suit in the United States District Court to overturn the jeopardy assessment. The District Court passed an order essentially "freezing" the assets of the Petitioners until resolution of the jeopardy assessment case. By way of resolving the District Court action, the Petitioners and the Internal Revenue Service entered into an agreement to escrow the funds subject to the levies. The total amount escrowed was approximately $20,000,000 of which approximately $10,000,000 consisted of liquid assets. The actual values of these escrow was never established in the proceedings below because of the procedural posture of the case, and the value of the liquid assets is an issue to be determined upon remand.

The escrow agreement provided that the parties would each appoint an escrow agent, and that each escrow agent could not act voluntarily without consent of the other. The escrowed funds could be disbursed by mutual agreement of the parties, or by order of a court entering final judgment on tax assessments for 1979 – 1983, inclusive, or if the court determined that the jeopardy assessment was not valid.

The escrow agreement was funded when the Internal Revenue Service transferred the levy proceeds to the escrow during the pendency of the challenge by the Petitioners to the jeopardy assessment.

The Petitioners' tax liabilities were ultimately resolved by United States Tax Court proceedings.

As a result the levies issued by the Internal Revenue Service pursuant to the jeopardy assessment remained in force, as did the escrow agreement, until May of 1991, a period in excess of five years.

The Petitioners were permitted receive only limited distributions from the escrow account to pay certain living expenses, such as tuition for their children and legal fees. These sums were disbursed only after the Internal Revenue Service agreed to the disbursements. The factual issue of how much was disbursed to the Petitioners remains to be determined upon remand.

The United States Tax Court stipulation provided that the Petitioners and others were liable for a total of $3,624,584, or just over 14% of the original $20 million assessment. The $3.6 million consisted of tax, penalty and interest, computed after netting offsets from years in which Petitioner LaRosa's International had overpaid tax.

This agreed-upon assessment of tax, penalty and interest was paid by the Petitioners and the other LaRosa family members, not parties to this case, on May 1, 1991. The funds used to pay this stipulated assessment were separate funds which were not held in the escrow account or subject to levy.

The Tax Court stipulation reserves to the Petitioners the right to make a claim against the Internal Revenue Service to recover interest on the levied funds. Petitioners also have the separately established right to demand interest on funds seized

by the Internal Revenue Service, pursuant to the statutes governing payment of interest on overpayments of tax.

After the U.S. Tax Court entered the stipulated order approving a settlement of the tax assessment, and the assessment was paid, the escrow account was dissolved and the Internal Revenue Service later released the levies. Pursuant to the reservation of their rights to seek interest on the escrowed funds, the Petitioners filed a timely refund claim with the Internal Revenue Service, which was denied. The Petitioners then timely commenced the instant case to recover interest on the escrowed funds.

Petitioners claim that they are entitled to recover this interest under the same rules as apply to overpayments of tax. The United States claims that the Government never had dominion and control over the liquid assets and so the Petitioners are not entitled to interest. Petitioners' position is that when the Internal Revenue Service served levy notices on the custodians of Petitioners' liquid assets, these levies reduced the liquid assets to the actual or constructive possession of the Government, and so the Petitioners are entitled to credit interest on the liquid assets from the dates of the levies. To the extent that this interest credit results in an overpayment, the Petitioners are entitled to a refund. The transfer of the levied funds to the escrow by the Internal Revenue Service does not change this result.

The first levy is dated December 3, 1985, and so levies were outstanding on the liquid assets totaling, as Petitioner contends, $10 million at issue here for a period of five years and four and one-half months. The interest, including the compound interest accrued from December 3, 1985 to the present day is approximately $7 million. The exact amounts are unresolved factual issues to be determined upon remand.

### B. Proceedings in the United States Court of Federal Claims

All of the relevant facts were stipulated and the proceedings below consisted of a ruling on cross motions for summary judgment.

The District Court, relying on *Rosenman v. U.S.*, 323 U.S. 568 (1945), held that the Internal Revenue Service never obtained possession, either actual or constructive, of the Petitioners' liquid assets, even though these assets were held by their custodians subject to service of a levy, and later transferred to an escrow account by the Internal Revenue Service.

In the *Rosenman* case, an estate was faced with a requirement that it pay estate tax within one year of the date of death of the decedent. The *Rosenman* estate was not in a position to compute the tax liability, so it estimated an amount and sent this estimated amount to the Internal Revenue Service as a deposit toward payment of any amount which may be found to be due. The *Rosenman* estate later filed the estate tax return and showed a tax

liability of about 25% of the amount originally paid in. This return was later audited by the Internal Revenue Service and an additional tax due was assessed on audit at an amount close to the amount originally paid in. The estate contested the higher tax liability and filed a claim for refund of a portion of the initial deposit.

The relevant statute provides that claims for refund must be filed within 2 years of the date of payment of tax, or the refund is time-barred. In *Rosenman*, the court held that the 2 year period begins to run only when the initial deposit of funds is applied to payment of the tax shown to be due after the subsequent assessment, and so the court allowed the refund claim to proceed because the deposit was applied to the tax assessment within the two year period, even though the initial deposit was made with the Internal Revenue Service more than 2 years before the claim.

Analogizing between the holding in *Rosenman* and the facts of the instant case, the Court of Federal Claims held that, like the taxpayer in *Rosenman*, the Petitioners' levied funds should be treated in the nature of the deposit, and so the

Petitioners would not be entitled to interest on these funds[1].

The Petitioners argued that *Rosenman* did not apply to the instant case because the remittance in *Rosenman* was a voluntary payment. In the instant case, the funds were distrained by the Internal Revenue Service and they were not voluntary payments. Moreover, at the time of the distraint in the instant case, there was an assessed balance of tax against the Petitioners. In *Rosenman*, the payment was made before the tax assessment came into being. The cases which have decided these issues, especially since *U.S. v. National Bank of Commerce*, 472 U.S. 713 (1985), have held that service of a levy notice by the Internal Revenue Service on the custodian of liquid assets reduces those assets to the actual or constructive possession of the Government. It follows logically, and under the statute providing for interest on tax overpayments, that once funds may be characterized as being in the actual or constructive possession of the Government, the taxpayer is entitled to a credit for the interest on the funds.

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[1] After the decision of the United States Court of Federal Claims in the instant case, Judge Braden issued the opinion in *Joan Huskins, Personal Representative of the Estate of Phillip Goldstein*, 75 Fed. Cl. 659, 99 A.F.T.R.2d 2007-1728, 2007-1 USTC P 60,538 (2007). That case sets forth factors distinguishing *Rosenman*. These factors, if applied to the instant case, would result in rejection of the rationale from *Rosenman*.

Although the funds in the instant case were later transferred into an escrow by the Internal Revenue Service, this transfer itself was an exercise of dominion and control over the funds by the Internal Revenue Service. Petitioners contend that the situation in *Rosenman* is factually and legally inapplicable to the situation presented by the instant case.

The District Court denied Petitioners' claims and the Petitioners filed a timely appeal to the Court of Appeals for the Federal Circuit.

### C. Proceedings in the Court of Appeals for the Federal Circuit

The Appellate Panel in the Court of Appeals for the Federal Circuit upheld the decision of the Court of Federal Claims. The Panel relied on the case of *U.S. v. Whiting Pools, Inc.*, 462 U.S. 198

(1983)[2], finding that service of a levy notice by the Internal Revenue Service on custodians of liquid assets does not reduce the levied asset to the actual or constructive possession of the Internal Revenue Service. This being the case, according to the logic of the Appellate Panel, the service of the levies on the Petitioners' liquid assets did not give rise to a claim for interest on the overpayment of the tax that was the subject of the levies.

Petitioners filed a Motion for Panel Reconsideration, pointing out that *U.S. v. Whiting Pools, Inc.* expressly applies only to levies on non-liquid assets. There are two reasons for this distinction. First, the language of the statutes differentiates between levies on liquid and nonliquid assets. Second, common sense dictates that

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[2] The parties in the courts below consistently analogized to bankruptcy turnover actions, the theory being that if a bankruptcy court would order assets turned over to the debtor-in-possession bankruptcy estate, after these assets had originally been distrained against the debtor-in-possession by the Internal Revenue Service, this indicates that the Internal Revenue Service did not have actual or constructive possession of the assets so as to entitle the taxpayer to interest. Conversely, if the bankruptcy court refused to order turnover of the assets, this indicates that the Internal Revenue Service had perfected its title to the seizure of the assets so as to entitle the taxpayer to interest credit on the seized assets. Turnover of assets in bankruptcy is governed by 11 U.S.C. §§ 542 and 543.

nonliquid assets must be sold before the cash can be applied to the tax debt. A levy on a liquid asset does not have a similar restriction.

The Appellate Panel also relied on the case of *Stead v. U.S.*, 419 F.3d 944 (9th Cir. 2005). In *Stead*, the Court held that the Internal Revenue Service does not take title to levied assets until it "reaps the proceeds of a tax sale or otherwise collects on the property of the taxpayer." *Stead* applies this rationale also to cash and cash equivalents.

In the Motion for Panel Reconsideration, the Petitioners pointed out to the Court that *Stead* was decided after the effective date of the procedural safeguards enacted by the Taxpayer Bill of Rights, specifically, 26 U.S.C. § 6332(c). That section of the Tax Code provides a 21 day "hold" between the service of a levy notice and the turnover of the liquid asset proceeds to the Internal Revenue Service. It was this 21 day delay in receipt of the funds by the Internal Revenue Service that justified the holding in *Stead*. Until the lapse of the 21 day period, the levied taxpayer could file a variety of administrative proceedings to release or modify the levy. Accordingly, levies served after the effective date of the Taxpayer Bill of Rights does not immediately vest the levied liquid assets in the actual or constructive possession of the Internal Revenue Service.

It is significant that 21 day hold did not apply to the levies in the instant case, because the "hold" did not become law until July 1, 1989, or about 3 1/2 years after the levies were served on Petitioners'

liquid assets in December of 1985 and January 1986. Prior to 1989, service of a levy notice on liquid assets vested these assets in the possession of the Internal Revenue Service immediately without any intervening 21-day holding period. *U.S. v. National Bank of Commerce*, 472 U.S. 713 (1985).

The Appellate Panel also held that the escrow agreement, into which the Internal Revenue Service deposited the levied assets after the service of the levy notices, brings *Rosenman* into play. The Panel held that the Internal Revenue Service did not obtain dominion over the funds because the funds were placed in the escrow.

Petitioners argued that the escrow does not affect their interest claim for two reasons. First, the escrow was created by the Internal Revenue Service and the Internal Revenue Service deposited funds from the levies into the escrow. Second, by virtue of the service of the levy notices on the custodians of Petitioners' liquid assets, the Internal Revenue Service came into the actual or constructive possession of these funds upon service of the levies. Later disposition of levied assets by the Internal Revenue Service does not exonerate those assets from payment of interest. Finally, all prior cases allow the taxpayer to attain credit for interest in the circumstances.

## REASONS FOR GRANTING THE PETITION

### A. The Appellate Panel Decision is Directly Contrary to Established Supreme Court Precedent.

The primary issue in the instant case is whether, when the Internal Revenue Service levies on the liquid assets of the Petitioners, this act of serving the levy notice gave the Petitioners the right to claim interest on the levied funds. In *U.S. v. National Bank of Commerce*, 472 U.S. 713 (1985), this Court held that service of a levy notice on the custodian of property by the Internal Revenue Service results in the Internal Revenue Service obtaining actual and/or constructive possession of the levied property. Once the Internal Revenue Service is in actual or constructive receipt of the property, the taxpayer is entitled to the benefit of having the value of the levied property applied against the balance of the tax assessment. If this receipt of the taxpayers property results in an overpayment, the taxpayer is entitled to interest.

The Internal Revenue Service should not be allowed to avoid paying or crediting interest on levied funds if there is a delay in applying those funds to a taxpayer's tax account. There is no court case, statute, or other precedent which would justify the failure of the Internal Revenue Service to pay or credit interest under the circumstances.

*National Bank of Commerce* squarely addresses the issues involved in Petitioners' claim. This case predates the procedural delays enacted by

the Taxpayer Bill of Rights. However, consideration of this issue by the United States Supreme Court at this time is as relevant to the universe of taxpayers today as it was before the Taxpayer Bill of Rights, because taxpayers should be entitled to have interest credited to their tax accounts after the lapse of the 21 day period following service of the levy.

26 U.S.C. § 6601 provides for payment of interest on overpayments of federal income tax, and the right interest under this statute begins when the tax is paid. It is difficult to understand why the service of a levy notice on a custodian of liquid assets should not be considered a payment of tax, both in the instant case, on the date when the notice is served, or on the 22nd day after service of the levy, under the law which applies to levy served after July of 1989. In the instant case, the tax due was not finally determined until after a delay of more than 5 years. Moreover, it was determined that the Petitioners had overpaid their taxes, by virtue of the levies, by nearly a factor of seven.

If the decision of the Court of Appeals for the Federal Circuit in the instant case stands, it stands in direct contradiction to the decision of this Court in *U.S. v. National Bank of Commerce*.

The federal courts have consistently distinguished between levies on liquid and nonliquid assets, particularly in the bankruptcy context. As the instant case involves a claim for interest only the value of the liquid assets that were subject to the levies, these cases are particularly instructive.

In the case of *U.S. v. Whiting Pools, Inc.*, 462 U.S. 198 (1983), this Court allowed a bankruptcy debtor-in-possession under Chapter 11 to secure the turnover of nonliquid assets which had been levied by the Internal Revenue Service within 90 days prior to the bankruptcy petition date, as allowed by bankruptcy law. The rationale of *Whiting Pools* is that a levy by the Internal Revenue Service on nonliquid assets does not ripen into actual and/or constructive possession until the nonliquid assets are liquidated by sale or other disposition. Since the nonliquid assets would not have been applied to the tax liability until the liquidation process was complete, this Court held that the debtor could obtain a turnover of these as yet unliquidated assets.

By way of contrast, bankruptcy courts applying *Whiting Pools* have not permitted debtors-in-possession to obtain a turnover of liquid assets which have been levied by the Internal Revenue Service prior to the filing of the bankruptcy petition, because a levy on liquid assets divests the taxpayer and vests the funds in the Internal Revenue Service.

For example, in *Ruggeri Electrical Contracting v. U.S.*, 185 BR 750; 80 AFTR2d 97-8033 (E.D. MI, 1995), the court, in a bankruptcy turnover action under the same fact pattern as *Whiting Pools*, allowed the Internal Revenue Service to retain proceeds of liquid assets, consisting of a bank account levied 20 days prior to the commencement of bankruptcy. (Incidentally, the reason this Court did not wait for the 21 days to expire under the Taxpayer Bill of Rights is because the bankruptcy debtor did not articulate a rationale for avoiding the

levy procedurally during the 21 day period, and so the court decided that the 21 days need not expire.)

The rationale of the court in *Ruggeri* is that there is a significant distinction between levied property which is liquid and that property which does not become liquid until after it is sold by the Internal Revenue Service. According to the court, the levy in *Ruggeri* transferred the levied cash to the actual or constructive possession of the Internal Revenue Service upon service of the levy notice. This transfer to the Internal Revenue Service immunized the cash from being turned over to the debtor-in-possession, from which the cash had been originally distrained.

Accordingly, the taxpayer in *Ruggeri* would be entitled to interest from the Internal Revenue Service on the levied funds from the date of the levy.

### B. The Fact that Funds were Escrowed is Not Determinative.

The fact that the Internal Revenue Service agreed to escrow funds after they had been levied upon does not change the result. Courts which have considered this issue have uniformly held that establishing an escrow account with funds which have been levied by the Internal Revenue Service does not change the legal status of these funds *vis a vis* payment of taxes from the escrow.

In a case which is directly on point with the facts in the instant case, *Stone v. Commissioner*, Memorandum Sur Order, U.S. Tax Court Docket No.

5311-72 (March 30, 1987), where the court addressed two situations where there was a delay between service of a levy notice by the Internal Revenue Service and the receipt of the levied funds by the Internal Revenue Service. In the first instance, the issue was whether interest accruing on funds held in a bank account for a one-year period following levies served on that bank account accrues to the benefit of the taxpayer. The *Stone* court also considered a situation where the Internal Revenue Service levied escrowed funds and then instructed the escrow custodian to hold the funds in escrow rather than turning the escrowed funds over to the Internal Revenue Service pursuant to the levy notice. A copy of the *Stone* Memorandum Sur Order is attached to this Petition at App. 29.

In both instances, the Tax Court ruled that the taxpayer was entitled to credit for interest as provided by 26 U.S.C. § 6601 on the levied funds, even though those funds were held in escrow and not turned over to the Internal Revenue Service for a period of about a year.

In *Stone*, as in the instant case, the Internal Revenue Service proceeded by jeopardy assessment against the taxpayer. In *Stone*, the court ruled that the interest stopped running on the portion of the jeopardy assessment to the extent of the funds tied up as a result of the service of the levy notices for the period of about a year while the funds remained on deposit, as well as those funds remaining in escrow, because the levies gave the Internal Revenue Service the immediate and unrestricted right to the funds. The Internal Revenue Service has this right even

though these funds were not turned over to the Internal Revenue Service until one year later.

It was the act of serving the levy which gave rise to a viable claim on behalf of Stone for the crediting of interest to the tax account. Due to the service of the levy notice, and the legal effect of that notice transferring actual and/or constructive possession of the levied funds to the Internal Revenue Service, the funds held in the bank and an escrow were treated as having been credited to a tax liability arising under a jeopardy assessment, from the date of service of the notice of levy.

In *Stone*, the taxpayer got credit for interest on the levied funds even though these funds were held by the banks pending the outcome of the challenge to the jeopardy assessment, and not turned over to the Internal Revenue Service until then. The taxpayer's entitlement to interest was not dependent on turning over the escrowed funds to the Internal Revenue Service, once the funds had been attached by way of service of the levy.

The Appellate Panel attempts to distinguish *Stone* on the grounds that the Internal Revenue Service in *Stone* could have demanded the surrender of the levied funds at any time. However, in the instant case, as in *Stone*, the Internal Revenue Service had complete dominion and control over the Petitioners' levied funds when it served the levies. The Internal Revenue Service decided, in its discretion, and in face of the fact that the jeopardy assessment against the Petitioners had been challenged in the United States District Court, to

establish the escrow account. There is no issue of surrender of funds in the instant case because the Internal Revenue Service had possession of the funds upon service of the levy notices, and then the Internal Revenue Service agreed to a disposition of the funds.

Like the taxpayers in *Stone*, the Petitioners in the instant case preserved their rights to challenge the jeopardy assessment, and so the assessment did not become final until more than five years later. This challenge, which resulted in the elimination of almost 86% of the balance of the Petitioners' original assessment, should be irrelevant to the issue of whether the Petitioners are entitled to have interest credited to their tax account.

The Appellate Panel also attempts to distinguish *Stone* on the grounds that the Internal Revenue Service in that case stipulated that the fact that interest accrued inside of the escrow on escrowed funds stops the running of the interest on the jeopardy assessment during the pendency of the escrow. This stipulation would seem rather to be in the nature of an admission by the Internal Revenue Service that interest on escrowed tax levies is applied against interest that runs on jeopardy assessments in general.

The fact that the Internal Revenue Service stipulated in *Stone* has no bearing on the instant case. The United States Tax Court stipulation, signed by Petitioners in the instant case as well as the Internal Revenue Service, and entered as a final order by the Tax Court, specifies that the Petitioners

may file a claim to recover interest on the levied funds.

The courts have considered a situation in which a taxpayer made a claim for interest on funds which were held in an interest-bearing escrow account, where the escrow account was established for the payment of the tax debt. In the case of *Berger et al. Ex'r of the Estate of Goldfarb v. U.S.*, 85-1 USTC ¶ 13,618; 56 AFTR 2d 85-6505 (S.D. NY 1985), the court held in favor of a taxpayer who, like the Appellant in the instant case, became entitled to a refund resulting from the fact that funds for payment of the taxpayer's taxes were held in an escrow account.

The *Estate of Goldfarb* taxpayer was entitled to collect interest from the Internal Revenue Service based on the difference between the interest earned by the treasury bonds held in the escrow account and the interest which would have been credited to the taxpayer under the statutes governing interest payments on the refund of a tax overpayment. This is exactly the relief which Petitioners are seeking.

The *Estate of Goldfarb* case also answers the objection that it is somehow not equitable for the Petitioners in this case to collect interest on the escrow account and then to collect interest again from the Internal Revenue Service. The law on this point is that interest earned on the escrow account offsets interest payable by the Internal Revenue Service, and so there is no double payment.

### C. Conflict in the Circuits

In *In re Barlows, Inc.*, 36 B.R. 826, 53 A.F.T.R.2d 84-767, 84-1 USTC P 9233 (Bankr. D. Va. 1984), *aff'd*, 767 F.2d 1098 (4th Cir. 1985), the Fourth Circuit held that the service of a levy on liquid assets such as accounts receivable, without more, reduces the levied asset to the dominion and control of the Internal Revenue Service. A levied liquid asset such as an account receivable would not be subject to a bankruptcy turnover action once the levy notice had been served on the asset's custodian, because the law is that the levy vests the asset in the Internal Revenue Service.

The Appellant Panel decision in the instant case holds that the service of a levy on custodians of liquid assets such as cash and marketable securities is irrelevant if the Internal Revenue Service later escrows the levied funds. This holding is in conflict with *In Re Barlows, Inc.* and it would represent a reversal of a significant body of law related to the effect of a levy of assets on a taxpayer's rights, which has been in existence for decades.

### D. Petitioners' Entitlement to Interest

The Petitioners in this case had their assets seized by the Internal Revenue Service and held for 5 1/2 years. When the tax balance due was finally determined, it was established that the tax ultimately due was only somewhat more than 14% of the amount of funds which had originally been levied. Then, against all established precedent, the

Petitioners were denied the right to recover interest on these levied funds.

The Internal Revenue Service sends out numerous levy notices every year and makes a significant number of jeopardy assessments against a large number of diverse taxpayers. The right to taxpayers to secure interest on the funds tied up in the proceedings is guaranteed by the Constitution of the United States, which prevents taking property without due process of law. Taxpayers are also protected by the statutes enacted by Congress to permit taxpayers credit for interest when they overpay their taxes.

## CONCLUSION

It is respectfully submitted that certiorari should be granted in this case because the decision of the Appellate Panel below is contrary to long-established precedent, including decisions of the United States Supreme Court, and also in conflict with other decisions of Federal Courts of Appeal.

A definitive ruling is needed to preserve the rights of all taxpayers to have interest properly credited to their accounts when their liquid assets are levied by the Internal Revenue Service. It is

therefore respectfully submitted that this Court should consider the instant case.

Respectfully submitted,

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